

**Federal Communications Commission
Washington, D.C. 20554**

In reply refer to:
1800B3-DEB

October 31, 1996

Richard E. Wiley, Esq.
Wiley, Rein & Fielding
1776 K Street NW
Washington, DC 20006

In re: KBUE; Long Beach, CA
Liberman Broadcasting, Inc.
BPH-951102ID

Dear Mr. Wiley:

This letter is in reference to the above-captioned application for a construction permit to increase the effective radiated power of KBUE, Long Beach, CA to the maximum permitted for a Class A station. An informal objection has been filed against this application by KPWR License, Inc., licensee of KPWR, Los Angeles, CA.¹ For the reasons explained below, we dismiss the application without fully ruling on KPWR's informal objection.²

Short-spacing to cochannel station KAVC, Rosamond, CA

Presently, KBUE is spaced 110.3 km from cochannel Class A station KAVC, Rosamond, CA, whereas 47 CFR § 73.207 requires a minimum separation of 115 km. The short-spacing was created by the revision in the spacing rules adopted in the *Second Report and Order* in MM Docket 88-375, 4 FCC Rcd 6375 (1989). Consequently, KBUE and KAVC are grandfathered with respect to each other and are governed by the provisions of 47 CFR § 73.213(c).

Waiver request. The applicant indicates that it sought to obtain a mutual increase agreement with KAVC pursuant to 47 CFR § 73.213(c) but was unable to obtain that station's consent. Having failed to

¹ KPWR styled its pleading as a formal objection pursuant to 47 CFR § 1.202(e) of the Commission's rules. However, only informal objections lie against minor change applications. Therefore, we are treating KPWR's filing as an informal objection pursuant to 47 CFR § 73.3587.

² A second informal objection was filed by Mount Wilson FM Broadcasters ("Mount Wilson"), licensee of second-adjacent channel station KKGO-FM, Los Angeles, CA, on January 11, 1996. However, on May 16, 1996, Liberman Broadcasting, Inc. and Mount Wilson filed an agreement in which the Mount Wilson objection was withdrawn, with Mount Wilson giving its consent to grant of the present KBUE application. However, because other deficiencies remain in the application which render it unacceptable for filing (as explained below), we have not considered the merits of the agreement at this time. Thus, in light of the agreement and our actions in this letter, Mount Wilson's informal objection will be dismissed as moot below.

obtain consent in keeping with the rule, KBUE now requests waiver of 47 CFR §§ 73.213 or 73.207 to obtain its desired power increase. In support of the request for waivers, KBUE states that a large mountain barrier which exists at a distance of approximately 45 to 65 km from KBUE and between KAVC and KBUE will impose terrain shielding of each station's signal and thereby prevent any actual interference.

A supplemental terrain analysis is provided to support this conclusion. In addition, KBUE claims that the increased power sought will help the station overcome the effects of atmospheric interference caused by ducting created by a temperature inversion layer between KBUE and a San Diego station. Affidavits of persons with knowledge of such complaints are provided. Once the station's power is increased, KBUE will provide Spanish language 60 dBu service to 41.6% more persons (totalling 5,670,482), of which 2,345,495 speak Spanish. Consequently, KBUE believes that grant of the requested waivers would serve the public interest. In its response to KPWR's objection, KBUE asserts that the policy of not granting spacing waivers adopted by the Commission in 1989 only applies to new transmitter sites and not cases where an applicant seeks to increase power at its present transmitter site.

KPWR's Informal Objection. KPWR's objection to the application states that the Commission discontinued granting spacing waivers in 1989, citing *Short-Spaced FM Assignments*, 4 FCC Rcd 1681 (1989), *aff'd*, 6 FCC Rcd 5356 (1991). KPWR also cites *Letter to Rebecca L. Dorch*, 9 FCC Rcd 2753 (1994) in support of its proposition that the Commission will not entertain requests for spacing waivers of § 73.207. Further, KPWR states that the use of terrain shielding to justify grant of a waiver has been attempted (and denied) many times before. Concerning the ducting interference cited by KBUE, KPWR indicates that they are not aware of any cases which a waiver request was granted because of interference caused by this phenomenon. KPWR does cite allotment proceedings wherein the Commission has rejected such requests, citing *Fairview and Cambridge Springs, PA and North Kingsville, OH*, 10 FCC Rcd 2149 (1995) and *San Clemente, CA*, MM Docket 84-442, released August 13, 1986. Moreover, KPWR contends that some of the affidavits alleging this type of interference are from persons located outside the 60 dBu protected contour of KBUE and are thus not protected from interference caused by other FM stations. Consequently, KPWR believes that there is no basis to grant any rule waiver.

Discussion. As indicated above, KBUE is governed by the provisions of 47 CFR § 73.213(c) with respect to KAVC, Rosamond, CA. That rule section provides a mechanism to be employed for applicants who wish to increase power above the limit in § 73.213(c)(1). Specifically, an applicant grandfathered under this rule section may seek to implement a mutual increase with the short-spaced station, or obtain written permission from that station for a unilateral increase. See 47 CFR § 73.213(c)(2); *Second Report and Order* in MM Docket 88-375, 4 FCC Rcd 6375 (1989) at Paragraph 52, *Memorandum Opinion and Order* in MM Docket 88-375, 6 FCC Rcd 3417 (1991) at Paragraphs 19 and 20. As KBUE has noted, it has been unable to obtain such consent from KAVC, and thus requests waiver of the rule.³

Grant of a waiver of § 73.213(c) is not warranted with respect to KAVC. The terms of that rule were

³ KBUE's concurrent request for waiver of § 73.207 is unnecessary since KBUE does not propose to change transmitter site or the spacing separations with respect to any other FM station. That rule deals only with minimum separation requirements, not the maximum permitted power and antenna height for a station which does not comply with the rule. Therefore, KBUE's request for waiver of § 73.207 will not be addressed further.

written so as to prevent the creation of new interference between the short-spaced stations, using the standard contour prediction method in 47 CFR § 73.313.. For example, if KBUE were to increase its ERP to the equivalent of 6.0 kW ERP and 100 meters HAAT (maximum Class A), no interference would be caused to KAVC's presently licensed operation. Yet that same increase would permanently preclude KAVC from increasing its ERP in the future at its present transmitter site, since any increase in ERP would cause new predicted interference within the 60 dBu contours of both KAVC and KBUE.⁴

Memorandum Opinion and Order in MM Docket 88-375, *supra* at Paragraphs 34 - 36. KAVC is entitled to withhold its consent for a power increase by KBUE if it so desires. Moreover, the Commission has held that written consent is necessary from the opposite station before a power increase may be implemented pursuant to 47 CFR § 73.213(c). See *The Livingston Radio Company*, 10 FCC Rcd 574 (1995). Consequently, we will not grant an authorization to KBUE which would preclude the potential of KAVC to increase its facilities at some future date without the written consent of KAVC containing a recognition of this impact.⁵

The reference to the intervening mountain range by KBUE, which is said to preclude any interference between KAVC and KBUE, also does not justify grant of the requested waivers. As KPWR has correctly noted, the Commission does not use terrain shielding to determine the locations of predicted interference. Nor does the Commission accept alternative propagation methods to demonstrate lack of interference between FM stations. Rather, the standard contour prediction method in 47 CFR § 73.313 is employed. This issue was examined in the contour protection rule proceeding which adopted 47 CFR § 73.215. *Memorandum Opinion and Order* in MM Docket 87-121, 6 FCC Rcd 5356 (1991) at Paragraphs 9, 12.

Like KPWR, the staff is not aware of any case in which the Commission has granted a rule waiver based on the premise of interference from atmospheric effects, nor has KBUE cited any. Atmospheric ducting is not limited to Southern California only, but also occurs in such widely scattered places as the Gulf of Mexico coast states and the Great Lakes region, as well as inland areas of the United States. Thus many FM stations are affected by similar disturbances. Moreover, the Commission recently affirmed the staff's denial of a spacing waiver request based in part on ducting phenomena. See *ECI License Company, L.P (WYUU)*, 11 FCC Rcd 3545 (1996). Consequently, this issue does not justify waiver of § 73.213.

The Spanish language programming aired by the station also does not justify waiver of a technical rule. The Commission does not scrutinize or regulate entertainment programming formats, nor does it take programming format into consideration in making its licensing decisions. In 1977, the Commission issued a Policy Statement in which it concluded that review of program formats was not required by the Communications Act, would not benefit the public, and would deter innovation, as well as impose substantial administrative burdens on the Commission. *Entertainment Formats*, 60 FCC 2d 858 (1979), *reconsideration denied*, 66 FCC 2d 78 (1977). The Supreme Court of the United States has upheld this

⁴ This does not occur where a mutual increase is proposed, since the protected and interfering signal strengths increase by corresponding amounts.

⁵ KBUE is limited to maximum facilities of no more than 1.05 kW ERP and 173 meters HAAT (its presently licensed facilities) toward the 1 mV/m (60 dBu) contour of KAVC. A directional antenna could be employed to provide this protection, although KBUE has rejected this approach since KBUE would not serve as many people as a nondirectional operation would. Alternatively, KBUE could employ the contour protection provisions of 47 CFR § 73.215, which would not require the consent of KAVC, but would also require directional operation.

policy, stating that "the public interest is best served by promoting diversity in entertainment formats through market forces and competition among broadcasters..." *WNCN Listeners Guild v. FCC*, 450 U.S. 582 (1981). See also, *Riverside Broadcasting Co., Inc.*, 53 RR 2d 1154, 1157 (1983), *reconsideration denied*, 56 RR 2d 618 (1984).

Moreover, waiving technical rules on the basis of non-technical considerations would tend to undermine the FM allocation scheme as a whole. The policy considerations underlying our current FM allocations scheme clearly outweigh any future benefits which would accrue were your waiver to be granted based on the nontechnical consideration of a particular type of programming. See *North Texas Media, Inc. v. FCC*, FCC 84-456 (released October 5, 1984), *aff'd*, Case No. 84-1511, slip. op. (D.C. Cir. December 6, 1985). Consequently, the station's current or proposed programming format has not been made a factor in our analysis.

Conclusion. We conclude that the additional population and area which would be served by a grant of KBUE's proposal does not outweigh the considerations explained above. Accordingly, KBUE's request for waiver of § 73.213(c) will be denied.

Short-spacings to second -adjacent channel stations KPWR, Los Angeles, CA and KKGO-FM, Los Angeles, CA

It is undisputed that KBUE, having been severely short-spaced to KPWR and KKGO-FM since the inception of the FM spacing rules in 47 CFR § 73.207 in 1962, is governed by the grandfathered station provisions of 47 CFR § 73.213(a) with respect to these two second-adjacent channel stations. As matters presently stand, KBUE's proposed 60 dBu contour (as well as its smaller 100 dBu interfering contour) is completely encompassed by the 60 dBu contours of these two Class B stations.

Presently, § 73.213(a) prohibits stations covered by the rule from extending the station's 1 mV/m (60 dBu) contour toward the 1 mV/m contour of the grandfathered short-spaced station. Consequently, the rule forbids KBUE from extending its 60 dBu contour in any direction.

Waiver requests. KBUE has requested waiver of the rule to allow the proposed power increase. In addition to the ducting interference, Spanish language format, and additional population served arguments raised by the station (which were addressed in the preceding section on KAVC and need not be reiterated here). KBUE asserts that the staff has a policy which permits stations like it to increase facilities in directions away from the grandfathered short-spaced station. In addition, the application concludes that KBUE's signal will never be 40 dB greater than the corresponding KPWR or KKGO-FM signal strength at any location, and thus no interference will be caused. Consequently, KBUE believes that its requested waivers of § 73.213(a) are justified.

Objection. KPWR's objection contends that KBUE has not demonstrated that its present service to Long Beach is "patently inadequate". Nor will the station serve any persons who currently lack service; indeed, the area proposed to be served by KBUE is served by a plethora of other radio services. KPWR alleges that the proposed power increase would cause new interference to both KPWR and KKGO-FM. Finally, KPWR notes that § 73.213(a) is the subject of a Petition for Rulemaking (RM-7651) which could affect the outcome of the KBUE proposal, and that any Commission consideration on the proposal would

be premature at this point.

Discussion. We do not find that the KBUE proposal merits grant at this time. As KPWR has correctly noted, the application of § 73.213(a) is the focus of a petition for rulemaking to examine this rule.⁶ Therefore, we will not now anticipate the results of that rulemaking proceeding in the context of the present application with respect to § 73.213(a). In any event, it is unnecessary for us to address this matter at this time in light of the § 73.213(c) deficiency covered above.

Final Conclusions

When an applicant seeks waiver of the rules, it must plead with particularity the facts and circumstances which warrant such action. *Columbia Communications Corp. v. FCC*, 832 F.2d 189, 192 (D.C. Cir. 1987) (quoting *Rio Grand Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 644, 666 (D.C. Cir. 1968) (per curiam)). We have afforded your waiver request the "hard look" called for under the *WAIT* Doctrine, *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), but find that the facts and circumstances set forth in the justification are insufficient to establish that granting waiver of 47 CFR § 73.213(c) with respect to KAVC would be in the public interest.

Consequently, the informal objection filed by KPWR IS GRANTED IN PART to the extent indicated above. The informal objection of Mount Wilson FM Broadcasters, having been withdrawn as indicated in Footnote 1, IS HEREBY DISMISSED AS MOOT. The requests for waiver of 47 CFR § 73.213(c) with respect to KAVC IS HEREBY DENIED, and the application BPH-951102ID IS HEREBY DISMISSED. These actions are taken pursuant to 47 CFR § 0.283 of the Commission's rules.

Sincerely,

Dennis Williams
Assistant Chief
Audio Services Division
Mass Media Bureau

cc: Radio Station KBUE (FM)
: Mr. Jules Cohen, PE
: Cohn & Marks
: Mr. John J. Davis
: Gardner, Carton & Douglas
: Lohnes & Culver

⁶ *Grandfathered Short-Spaced FM Stations (NPRM)*, MM Docket 96-120, 61 Fed. Reg. 33474, released June 14, 1996.